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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 643.

BENTLEY W. WARREN and CHARLES W. MULCAHY, as the Trustees of the property of Boston and Providence Railroad Corporation, Debtor,

Petitioners,

—against—

HOWARD S. PALMER, JAMES LEE LOOMIS and HENRY B. SAWYER, as the Trustees of the property of The New York, New Haven and Hartford Railroad Company, Debtor,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION.

HERMON J. WELLS,
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Of Counsel.

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION.

Opinions Below.

The opinion and order of the District Court for the District of Connecticut (R., pp. 251-267) is reported in 26 F. Supp. 18. The opinion of the Circuit Court of Appeals (R., pp. 304-310) is reported in 108 F. (2d) 164, *sub nom. Palmer* v. *Warren*.

Jurisdiction.

The Circuit Court of Appeals' order for mandate was entered on January 8, 1940 (R., pp. 316, 317). The petitioners have invoked the jurisdiction of this

Court under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347).

Question Presented.

Both the District Court for the District of Connecticut and the Circuit Court of Appeals found jurisdiction from the fact that the former had taken and retained actual physical possession of the property of Boston and Providence Railroad Corporation, lessor,[1] and had operated that property continuously since the commencement of proceedings under Section 77 of the Bankruptcy Act to reorganize The New York, New Haven and Hartford Railroad Company, sublessee, and Old Colony Railroad Company, lessee.[2] Petitioners fail to include this most important fact in the question as they present it to this Court. Their question also omits all reference to the fact that the present controversy involves ascertainment of the amount of the expenses incurred by the trustees appointed by the Connecticut Court in operating and administering Boston and Providence property, and the imposition of a lien therefor on that property. The "question" should have been stated, in substance, as follows:

Did the Connecticut Court, having come into phy-

[1] Petitioners' specification of error No. 3 is inconsistent with the facts in contending that the trustees appointed by the Connecticut Court did not have physical possession of the Boston and Providence property. Those trustees were and still are operating that property.

[2] The three railroad companies will be referred to respectively as "the New Haven", "the Old Colony" and "the Boston and Providence". The District Court for the District of Connecticut will be referred to as "the Connecticut Court". The District Court for the District of Massachusetts, in which proceedings for the reorganization in bankruptcy of Boston and Providence were recently commenced, will be referred to as "the Massachusetts Court".

sical custody of the property of Boston and Providence, lessor, in proceedings under Section 77 of the Bankruptcy Act to reorganize the New Haven, sublessee, and the Old Colony, lessee, have jurisdiction to determine the expenses of its administration and operation of said property and to impose a lien thereon for the amount of said expenses, or was such jurisdiction superseded by the subsequent filing of a petition in the Massachusetts Court for reorganization of the lessor under said Section?

*Statement.**

Before the proceedings for the reorganization of the New Haven began, it, as sublessee of Old Colony, was in actual physical possession of and operating the Boston and Providence property (R., p. 183, fols. 547, 548). After those proceedings started on October 23, 1935, the Boston and Providence property came into the actual possession of respondents as trustees appointed by the Connecticut Court (R., p. 183, fol. 548). They have possessed and operated it ever since as officers of the Court which appointed them, and under that Court's directions. They are doing so now under an order of that Court (R., pp. 208-210) entered July 19, 1938, when the lease was rejected (R., p. 211), and providing in part:

> "5. Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be con-

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* Emphasis should be placed on respondents' possession under orders of the Connecticut and Massachusetts Courts. We do this here without restating the facts set forth in the petition (Rule 27(4)).

> tinued pursuant to subdivision (e)(6) of Sec. 77* of the Bankruptcy Act, and since the Old Colony Railroad Company, as lessee of Boston and Providence, and likewise the Old Colony Trustees, are wholly without any operating organization, the operation of Boston and Providence properties shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate."

Indeed, the Massachusetts Court has enjoined any interference with the "present operation" of the railroad or properties of the Boston and Providence (R., p. 228, fol. 683), the petition of its creditor for its reorganization having alleged, and it having by answer admitted, that the property was being operated for its account pursuant to Section 77(e)(6) by respondents as trustees under the foregoing order of the Connecticut Court (R., p. 223, fols. 668, 669; p. 226, fol. 678). And the Massachusetts Court has carefully refrained from interfering in any way with the present proceedings in the custodial court for ascertainment and charge of that Court's expenses of operating and administering the property in the New Haven-Old Colony reorganization proceedings (R., p. 250). At no time has the Boston and Providence—

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* "Sec. 77(e)(6). If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended."

or any one for it—asked for repossession of its road. The fact of the matter is that respondents have been required to operate it because thus far no one else has been able to do so (R., p. 308, fol. 923).

Argument.

The petition fails to show any reason why the writ should be granted, for:

(1) The decision below, instead of being in conflict with decisions of Circuit Courts of Appeal cited by petitioners, is supported by those decisions.

(a) *Magnolia Petroleum Co.* v. *Thompson*, 106 F. (2d) 217, C. C. A. 8th, 1939, certiorari granted December 4, 1939 (Petition, pp. 7-11).

In the *Magnolia* case the Circuit Court of Appeals stated that the jurisdiction of a court in charge of the reorganization of a railroad under Section 77 to determine a question of title to mineral rights claimed by the railroad depended on whether the railroad's trustee had physical possession of the subsoil. The sole question was whether or not such possession existed. The adverse claimants argued that the deeds to the railroad had granted it a perpetual easement for railroad purposes, limited to the surface and not extending to the subsoil. The court held that as a matter of local law the deeds granted only an easement. The parties stipulated that this limited surface easement did not give the trustees possession of the subsoil, and accordingly the reorganization court did not have jurisdiction to determine subsoil mineral rights.

Thus there is no conflict or possibility of conflict between the two cases on what constitutes possession; and both cases illustrate in striking fashion the familiar rule of law, not disputed by petitioners in the Court below (R., pp. 306, 307, fols. 918, 919), that possession is the basis for bankruptcy jurisdiction. The application of this rule to property in the possession of a bankrupt lessee seems never to have been questioned. *Gazlay* v. *Williams*, 210 U. S. 41 (1908); *Lindeke* v. *Associates Realty Co.*, 146 Fed. 630, C. C. A. 8th (1906); *In re Barnhardt Coal & L. Co.*, 265 Fed. 385, N. D. Ohio (1919); *In re Chambers, Calder & Co.*, 98 Fed. 865, D. R. I. (1900); *In re Kleinhans*, 113 Fed. 107, W. D. N. Y. (1902); *In re Schwartzman*, 167 Fed. 399, D. S. C. (1909); 5 Remington, Bankruptcy (4th Ed. 1936), Sec. 2354; cf. *In re Adams*, 134 Fed. 142, D. Conn. (1905); *Plaut* v. *Gorham Mfg. Co.*, 159 Fed. 754, S. D. N. Y. (1908); *Eldridge* v. *White & Black River V. R. Co.*, 194 Ark. 800, 109 S. W. (2d) 658 (1937).

(b) *Thompson* v. *Terminal Shares, Inc.*, 104 F. (2d) 1, 9, C. C. A. 8th, 1939, certiorari denied, October 9, 1939 (Supplement to Petition).

In that case all of the property in question was in the actual possession of adverse claimants not served in the district. For that reason the Court held it had no jurisdiction over the property, but stated it would have had jurisdiction if the property had been "in the actual or constructive possession of the debtor at the time the petition for reorganization was filed and approved * * *", this being "the traditional jurisdiction" of bankruptcy courts which was continued

by Section 77 (104 F. (2d) at p. 9). Here is concurrence and not conflict.

(c) *General Motors Acceptance Corp.* v. *Horton,* 85 F. (2d) 452, C. C. A. 3d, 1936.

In the *Horton* case the lessor sought, presumably by reclamation petition to the bankruptcy court, "to gain possession of the automobile * * *. from the lessee's trustee in bankruptcy" (85 F. (2d) at p. 453) and the question presented was whether or not it should be returned. The possession of the trustee made the court's jurisdiction so clear that it was not even mentioned. Having jurisdiction, the Court *exercised it* and decided that the property should be returned. The same situation was presented in *In re Lake's Laundry,* 79 F. (2d) 326, C. C. A. 2d, 1935, certiorari denied 296 U. S. 622. Actual possession in the present case is as clear as it was in the *Lake's Laundry* and *Horton* cases. For that reason, jurisdiction is equally clear.

(2) Decisions of this Court have clearly settled the "question" of federal law that petitioners are seeking to present (see "Question Presented", *supra,* pp. 2-3) and Congress has adopted the rule of these decisions into Section 77 of the Bankruptcy Act.

(a) Decisions of this Court.

Where courts would otherwise have concurrent jurisdiction over specific property, the actual possession of it by one of them withdraws the property from the jurisdiction of all others. This principle has been so clearly settled by decisions of this Court that no question with regard to it now exists. It owes its

origin to no statute. It is not peculiar to courts of bankruptcy, but is applicable to all courts, federal and state. *Murphy* v. *John Hofman Co.*, 211 U. S. 562 (1909). It has often been applied in favor of a bankruptcy court. *White* v. *Schloerb*, 178 U. S. 542 (1900); *Isaacs* v. *Hobbs Tie and Timber Co.*, 282 U. S. 734 (1931); and it has also been invoked against a bankruptcy court where jurisdiction over the property has first been obtained by another tribunal. *Straton* v. *New*, 283 U. S. 318 (1931); *Metcalf* v. *Barker*, 187 U. S. 165 (1902); *Pickens* v. *Roy*, 187 U. S. 177 (1902); *Peck* v. *Jenness*, 7 How. 612 (1849). It is applicable also as between a receivership court and another court, *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38 (1908), as well as between receivership courts. See *Harkin* v. *Brundage*, 276 U. S. 36, 43 (1928).

Petitioners, to be sure, suggest that this well-established basis of jurisdiction has been abandoned as to courts proceeding under Section 77, but the suggestion flies in the face of all that has been said or decided on the matter. *Ex parte Baldwin*,* 291 U. S. 610; *Board of Directors of St. Francis Levee District* v. *Kurn*, 91 F. (2d) 118, C. C. A. 8th (1937); *Eldridge* v. *White & Black River V. R. Co.*, 194 Ark. 800. Petitioners' notions are based on language taken out of its context in a note found in Mr. J. W. Moore's

* Petitioners in this connection point to this Court's statement (291 U. S. 610, 615) that: "All property in the possession of a bankrupt of which he claims the ownership, passes upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy." But jurisdiction in that case did not turn upon title. Instead this Court said it turned upon "possession"; and possession gave "exclusive" jurisdiction under Section 77 to "determine all questions" regarding the property though it was outside of the district. Indeed it cited most of the cases cited herein.

1937 edition of Collier on Bankruptcy, which discusses *Continental Ill. National Bank* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648 (1935). The rest of the note discloses the author's meaning to be that Section 77 abandons any *limitation* of jurisdiction to property possessed by the debtor, not that the section abandons possession as a basis of jurisdiction. And certainly no more unlikely inference can be drawn from the *Rock Island* case than that Section 77 has contracted powers already possessed by courts of bankruptcy.

(b) The provisions of Section 77.

Before the reorganization amendments, the Bankruptcy Act itself made no mention of "exclusive jurisdiction". But this Court consistently used these words to describe the power of a bankruptcy court over property in its physical possession. *Hebert* v. *Crawford*, 228 U. S. 204, 208 (1913); *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 569 (1909); *Taylor* v. *Sternberg*, 293 U. S. 470, 472 (1935); *Straton* v. *New*, 283 U. S. 318, 321 (1931); *Isaacs* v. *Hobbs Tie and Timber Co.*, 282 U. S. 734, 737 (1931). The language has never been thought to affect jurisdiction obtained by another court through prior possession of property, except where the bankruptcy power is made paramount. *Straton* v. *New*, *supra*; *Metcalf* v. *Barker*, 187 U. S. 165 (1902); *Peck* v. *Jenness*, 7 How. 612 (1849); *In re Continental Coal Corp.*, 238 Fed. 113, C. C. A. 6th (1916).

Section 77(a) provides in part that:

> "* * * If the petition is so approved, the court in which such order is entered shall, during

> the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located. * * *"

And Section 77(1) states that:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, *shall be the same* as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

In this manner a principle long familiar was adopted unequivocally by Congress. *Ex parte Baldwin*, 291 U. S. 610, 615 (1935); and in adopting it, Congress used familiar words—a fact that is not without significance. *Case* v. *Los Angeles Products Co., Ltd.*, 84 L. Ed. 22, 29 (1939).

In spite of all this petitioners contended below that the jurisdiction vested in the Massachusetts Court by Section 77(a) and by the petition for the reorganization of Boston and Providence automatically overrode the Connecticut Court's custodial jurisdiction over that debtor's railroad. If this contention could ever have raised a substantial question as to the meaning of the statutory phrase, the question has been set at rest by this Court's interpretation of the same words in an analogous statute. *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216 (1936). There it is distinctly held that where a debtor's property is within the possession—and so, within the jurisdic-

tion—of one court, such jurisdiction is not automatically superseded by subsequent proceedings for the reorganization of the debtor (under Section 77B) in another court (unless the first court was engaged in reorganizing or liquidating the same debtor). This is true despite the grant of "exclusive jurisdiction" to the latter court. And by the very terms of Section 77(a) above quoted the Massachusetts Court's jurisdiction over Boston and Providence property is not "exclusive" without qualification, but only for the purposes of reorganizing the Boston and Providence.*

Petitioners argue that an exercise by the Connecticut Court of its jurisdiction in the present case would defeat the reorganization of the Boston and Providence in Massachusetts and be tantamount to its reorganization in Connecticut (Petition, pp. 13-14). A short answer to this argument is to be found in the opinion below (R., pp. 309, 310, fols. 929-930). Moreover in fact and at present the Boston and Providence is being reorganized separately and in its own proceedings before the Commission and the Massachusetts Court.

* Assume by way of analogy that in the ordinary course of carrier operations a freight shipment had come into the hands of respondents in Massachusetts. The Connecticut Court would have jurisdiction to determine claims of the estate against that property for freight charges and to impose a lien therefor even though after the charges had accrued and while the shipment was still in respondents' possession the owner of the shipment went into 77B proceedings in Massachusetts. The "exclusive jurisdiction" of the 77B debtor and its property for the purpose of its reorganization would not automatically oust the Connecticut Court of the jurisdiction resulting from its possession of the shipment—a jurisdiction incidental to the reorganization of another debtor a part of whose estate has been expended on the property in question for the owner's benefit.

CONCLUSION.

Since the decisions on this question are not in conflict and since the question has been settled by this Court, the petition should be denied.

Respectfully submitted.

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